Supreme Court, U.S.
FILED
AUG 15 1991
OFFICE OF THE CLERK

(3)

No. 90-1940

In the Supreme Court of the United States

OCTOBER TERM, 1991

TRAPPER MINING, INC., ET AL., PETITIONERS

v.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners entered into leases to mine coal on federal land pursuant to a statute that provided for readjustment of the terms of such leases at 20-year intervals "unless otherwise provided by law at the time of the expiration of such periods," 30 U.S.C. 207 (1970). The questions presented are:

1. Whether petitioners' coal leases, which incorporate the statutory provision, permitted Congress to reduce the readjustment interval from 20 years to 10 years effective at the expiration of the 20-year readjustment period.

2. Whether the 1976 amendments to the statute, 30 U.S.C. 207(a), reduced the readjustment interval of petitioners' coal leases from 20 years to 10 years at the expiration of the 20-year readjustment period.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A14, is reported at 923 F.2d 774. The bench ruling and orders of the district courts, Pet. App. A15-A32, A35-A40, are unreported. The decisions of the Interior Board of Land Appeals (IBLA), Pet. App. A41-A51, A52-A65, are reported at 106 I.B.L.A. 339 and 103 I.B.L.A. 366.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1991. A joint petition for rehearing was denied on March 20, 1991. Pet. App. A66-A67. The petition for a writ of certiorari was filed on June 18, 1991. The ju-

risdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Trapper Mining Inc. (Trapper) and Wyodak Resources Development Corp. (Wyodak) obtained leases to mine coal on federally-owned lands in Colorado and Wyoming from the Department of the Interior under Section 7 of the Mineral Leasing Act (MLA), 30 U.S.C. 207 (1970). Section 7 required that leases be granted "for indeterminate periods upon condition of diligent development and continued operation of the mine or mines"; that the Secretary condition leases upon payment of a minimum production royalty of five cents per ton; and that "at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods." *Ibid.*

Each of petitioners' leases provides for readjustment in terms and at intervals consistent with Section 7. Section 3(d) reserves to the government:

> The right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

Pet. App. A3, A76.

2. In 1976, Congress revised the coal leasing provisions of the MLA in the Federal Coal Leasing Amendments Act (FCLAA), Pub. L. No. 94-377, 90 Stat. 1083. Section 6 of the FCLAA, 90 Stat. 1087 (codified at 30 U.S.C. 207), amended Section 7 of the MLA, 30 U.S.C.

207 (1970). Among other changes, Section 6 requires the payment of royalties, "in such amount as the Secretary shall determine," of not less than 12.5 percent of the value of coal mined. 30 U.S.C. 207(a). Section 6 also requires readjustment of leases at the end of the "primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended." *Ibid.*[1] Consistent with Section 6, the Secretary promulgated regulations in 1976 providing that "[a]ll coal leases will be subject to readjustment at the end of the first 20-year period following issuances of the lease and at each ten-year period thereafter." 41 Fed. Reg. 56,646 (formerly codified at 43 C.F.R. 3522.2-1(b)(1977)). The current regulations, issued in 1979, likewise provide that all pre-FCLAA leases (*i.e.*, those issued prior to August 4, 1976) "shall be subject to readjustment at the end of their current 20-year period and at the end of each 10-year period thereafter." 43 C.F.R. 3451.1(a)(1).

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[1] The amendment provides in relevant part:

> (a) A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated. The Secretary shall by regulation prescribe annual rentals on leases. A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12 1/2 per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations. The lease shall include such other terms and conditions as the Secretary shall determine. Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

30 U.S.C. 207.

3. Since Trapper's predecessor in interest obtained its two leases in 1958, and Wyodak obtained its lease in 1959, the leases at issue in this case first became subject to readjustment in 1978 and 1979. The Interior Department's Bureau of Land Management (BLM) forfeited the government's right to readjust the terms of the leases at that time, however, by sending an untimely notice of readjustment to Trapper and by failing to send actual changes in terms and conditions to Wyodak despite a timely notice. Pet. App. A4, A25, A54; see *Rosebud Coal Sales Co.* v. *Andrus*, 667 F.2d 949, 952-953 (10th Cir. 1982); *Kaiser Steel Corp.*, 63 I.B.L.A. 363 (1982). The BLM subsequently notified petitioners that their leases would be readjusted 10 years after the twentieth anniversaries of the leases in accordance with Section 6 of the FCLAA.[2] Pet. App. A4.

Both petitioners told the BLM that they objected to the 1988 and 1989 readjustment of their coal leases. They argued that the readjustment interval could be modified only through a valid readjustment by the Secretary, which could not occur until the expiration of another 20-year period. The BLM overruled that objection. Pet. App. A44, A56. On appeal, the IBLA affirmed the BLM's decisions in relevant part. Pet. App. A41-A51, A52-A65.

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[2] The Wyoming State Office of the BLM had previously sent Wyodak a letter erroneously stating that its lease would be subject to readjustment again in 1999. Wyodak argued before the lower courts that the Secretary was estopped from readjusting its lease in 1989, an argument that the court of appeals rejected. Pet. App. A12-A13. See *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917) ("the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit").

4. Trapper and Wyodak filed petitions for review in the United States District Courts for the Districts of Colorado and Wyoming. Pet. App. A4.

The Colorado district court affirmed the readjustment of Trapper's leases. Pet. App. A35-A39. It noted that the government may modify contracts by subsequent legislation and held that the "clear language" of the statute and relevant case law indicate that Congress intended the ten-year period mandated by the FCLAA to apply automatically to Trapper's leases on their twentieth anniversaries. *Ibid.*

The Wyoming district court reversed the readjustment of Wyodak's lease. Pet. App. A23-A32. It held that the 20-year readjustment period is simply a "term" of the lease, and, like other terms and conditions of Wyodak's lease, could not be changed absent a valid readjustment by the Secretary. *Ibid.*

5. The court of appeals consolidated the two cases and upheld the readjustment of petitioners' leases. Pet. App. A1-A22. First, the court stated that Congress has the authority to modify contracts through subsequent legislation unless such authority is "surrendered in unmistakable terms." Pet. App. A7. Petitioners' leases did not surrender the power to modify the readjustment interval by statute; to the contrary, they expressly provided for readjustment by the Secretary every 20 years "unless otherwise provided by law" at the end of such a period. *Ibid.* The court rejected petitioners' argument that this "exception" only reserved to Congress the power to control the *Secretary's* authority to readjust the coal leases. It held that Congress instead reserved the power to establish by statute a new readjustment interval for federal coal leases to apply at the expiration of a 20-year period. Pet. App. A7-A9.

Second, the court of appeals concluded that Congress exercised its authority in Section 6 of the FCLAA. The

plain language of the statute states that leases "will be" subject to readjustment every ten years after the first 20-year period ends. Pet. App. A10. The court concluded that the mandatory language is "self-executing" and "directly imposes the new interval rather than just modifying the Secretary's authority over the term." *Ibid.* The court distinguished other provisions in Section 6, such as the one requiring a minimum royalty rate, because they are "couched as a restriction on the Secretary's power" to readjust, "not as a direct imposition of the new rate." Pet. App. A10, A12.

ARGUMENT

1. The first question presented is of limited and diminishing significance. It concerns the readjustment interval in federal coal leases entered into before passage of the FCLAA in 1976. It arises only in leases that the Secretary mistakenly fails to adjust. And it has been decided only by the court of appeals in this case. Since the lower court's decision is correct and does not conflict with any decision of this Court or of any other court of appeals, further review is not warranted.

a. Petitioners read their coal leases to say that "Congress did not reserve the power to directly modify the twenty-year interval or any other terms in the petitioners' lease agreements by legislation." Pet. 14. Petitioners rely on Section 3(d) of their leases, which reserves to the government:

> The right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease *unless otherwise provided by law at the time of the expiration of any such period.*

Pet. App. A3, A76 (emphasis added).

Contrary to petitioners' interpretation, the "unless otherwise provided by law" clause reserves to the government the authority to change—"by law"—the readjustment interval (and any "other terms and conditions" of the lease) "at the time of the expiration of any such [20-year readjustment] period." Although petitioners suggest that the scope of the clause is ambiguous, Pet. 13-14, that ambiguity does not affect the proper disposition of this case. Whether the clause modifies all the "terms and conditions" of the lease or just the readjustment interval, it plainly reserves Congress's statutory authority to reduce from 20 years to 10 years the period during which the Secretary may not readjust the lease.

The "unless otherwise provided by law" clause cannot plausibly be read to modify the Secretary's "right" to readjust. Congress has the right to limit the Secretary's authority, regardless of the lease provision, and may exercise that right at times other than "at the time of the expiration of any such [20-year readjustment] period." Pet. App. A3. It is likewise implausible to read the clause to modify the word "reasonable," for on that view, Congress would have reserved to itself the power to impose "unreasonable" terms on lessees. See Pet. App. A8.[3]

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[3] The court of appeals' interpretation of the "unless otherwise provided by law" clause is consistent with its construction of the clause in two prior decisions. See *FMC Wyoming Corp.* v. *Hodel*, 816 F.2d 496, 501 n.9 (10th Cir. 1987), cert. denied, 484 U.S. 1041 (1988); *Coastal States Energy Co.* v. *Hodel*, 816 F.2d 502, 505-506 n.6 (10th Cir. 1987). There is even less reason for review by this Court now than there was when certiorari was denied in *FMC Wyoming Corp.* Moreover, as the court of appeals correctly recognized, Pet. App. A8—contrary to petitioners' contention, Pet. 13 n.5—its earlier decisions did not read the clause to preserve only Congress's right to circumscribe the Secretary's readjustment authority. In any event, any allegation of an intra-circuit

Although Section 3(d) goes on to provide petitioners with notice and an opportunity to object to proposed readjusted terms, Pet. 5, the notice and comment provision does not (contrary to petitioners' contention, Pet. 12 & n.3) surrender the government's authority to impose a new readjustment interval by law. The Secretary's "right reasonably to readjust" the lease terms—and the notice and comment procedure that accompanies it—is expressly superseded if "otherwise provided by law at the time of the expiration of any such" readjustment interval.

Petitioners also cite the introductory paragraph of their leases, which incorporates the law in effect at that time, as evidence that the lease agreements are immune from subsequent legislation. Pet. 12. The affirmative incorporation of existing law, however, does not impliedly exclude the applicability of subsequent legislation. Instead, the reservation of authority to readjust the lease and to impose other changes "provided by law" makes clear that the parties to the lease anticipated the need to comply with subsequent legislation.

b. Even if the leases did not expressly "*reserve*" Congress's authority to modify the readjustment interval by law, Pet. 14 (emphasis added), Congress would nevertheless retain that authority because it did not "*surrender[]*" it "in unmistakable terms," *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (quoting *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) (emphasis added)). In *Public Agencies*, this Court reiterated the principles governing contractual relationships between the United States and private parties. It emphasized "this Court's often-repeated admonitions that contracts should be

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conflict is for the court of appeals, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

construed, if possible, to avoid foreclosing exercise of sovereign authority." 477 U.S. at 52-53. Accordingly, contracts—including those to which the government is a party—remain "'subject to subsequent legislation' by the sovereign" unless its authority to exercise such right is "surrendered in unmistakable terms." *Id.* at 52 (quoting *Merrion*, 455 U.S. at 148).

The coal leases in this case did not surrender Congress's power to enact subsequent legislation affecting the government's contracts under the MLA. As the court of appeals pointed out, the statutory phrase, "unless otherwise provided by law at the time of the expiration of such [readjustment] periods," 30 U.S.C. 207 (1970), is echoed in petitioners' original pre-FCLAA leases. Pet. App. A7. Reasoning that interpretations of contracts "which would immunize them from the sovereign power of the United States to change its laws should be avoided," *ibid.* (citing *Public Agencies*), the court of appeals correctly concluded that Congress did not surrender its power to change the readjustment interval by statute, *ibid.*

Petitioners assert that since the government drafted the coal leases (in language tracking Section 7 of the MLA), any ambiguity should be construed against the United States, as it might be construed against a private party. Pet. 14. But the government is not a private party, and—as this Court has repeatedly held—any surrender of governmental regulatory authority through contract must be expressed in "clear and unmistakable" terms. *Merrion*, 455 U.S. at 148; accord *Public Agencies*, 477 U.S. at 52. Although petitioners assert that the rules applicable to private parties apply to the government when it enters into a commercial contract, the Court rejected precisely that argument in *Public Agencies*:

> *While* the Federal Government, as sovereign, has the power to enter contracts that confer vested

> rights, and the concomitant duty to honor those rights, see *Perry* v. *United States*, 294 U.S. 330, 350-354 (1935); *Lynch* v. *United States*, 292 U.S. 571 (1934), *we have declined in the context of commercial contracts to find that a "sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in" the contract.*

477 U.S. at 52 (quoting *Merrion*, 455 U.S. at 148) (emphasis added). Compare Pet. 16 (omitting italicized words).[4]

2. The second question presented is whether Congress exercised its authority to change the readjustment interval in petitioners' coal leases by Section 6 of the FCLAA. Petitioners concede (Pet. 17) that this question does not independently merit this Court's review. It presents a narrow question of statutory construction which the court of appeals correctly decided.

Section 6 of the FCLAA expressly states that "rentals and royalties and other terms and conditions of the lease *will be* subject to readjustment" every 10 years after the first 20-year period ends. 30 U.S.C. 207(a) (emphasis added). The court correctly characterized that change as "mandatory" and "self-executing." Pet. App. A10. Petitioners argue that the lease conditions subject

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[4] For the same reasons, petitioners' contention (Pet. 14-15) that the court erred in construing the statutory phrase to be "synonymous" with language reserving Congress's right to "repeal, alter, or amend" the statute is without merit. This Court has recently denied certiorari in a case raising a similar issue. *Peterson* v. *Department of the Interior*, 111 S. Ct. 567 (1990). The court of appeals in that case, faced with a statute containing no express reservation, had rejected the claim that Congress must expressly reserve its right to "repeal, amend or alter" legislation to retain that authority. See *Peterson* v. *United States Dep't of the Interior*, 899 F.2d 799, 807-808 (9th Cir. 1990).

to readjustment are limited to those specified in the preceding sentences of Section 6. Pet. 18. But the quoted language does not state that "the preceding conditions will be subject to readjustment every ten years"; it states that "rentals and royalties *and other terms and conditions*" will be. 30 U.S.C. 207(a) (emphasis added).

Petitioners also contend that the "design" and legislative history of the statute fail to support the court of appeals' interpretation. Pet. 18. As the court of appeals correctly recognized, however, the statutory provisions petitioners cite do not deprive Congress of the authority to modify the readjustment interval by law. Pet. App. A12. And although the court rested its holding on the plain language of Section 6, "without reference to the legislative history," it noted that the House debate "supports our conclusion that Congress intended to change the readjustment interval by statute," rather than through the readjustment process. Pet. App. A13. Compare H.R. Rep. No. 681, 94th Cong., 2d Sess. 24 (1975) ("H.R. 6721 provides for a readjustment in the terms of the lease at the end of the 20th year and every ten years thereafter instead of a readjustment every 20 years as *provided in the present law*" (emphasis added)), with *ibid.* ("H.R. 6721 *permits the Secretary* to waive the requirement for continued operation" (emphasis added)).

Petitioners assert that the court of appeals' interpretation makes an "irrational distinction" between the ten-year interval and "other terms and conditions" of the leases. Pet. 18, 19. Contrary to petitioners' contention, treating the readjustment interval differently from other provisions of Section 6 (such as the one governing the Secretary's determination of royalty rates), is entirely consistent with Section 6. As the court of appeals explained:

> [T]he language in [Section] 6 mandating the royalty rate only affects the Secretary's control over the term. It states that "[a] lease shall require payment of a royalty in such amount *as the Secretary shall determine* of not less that 12 1/2 per centum." (Emphasis added.) This requirement is couched as a restriction on the Secretary's power, not as a direct imposition of the new rate.

Pet. App. A10. By contrast, there is no express provision subjecting the length of the readjustment period to readjustment. That reflects the fact that the Secretary has never had the authority to dictate the readjustment interval of coal leases, and therefore "cannot thwart the intent of Congress by simply not undertaking a readjustment"—leaving the leases with their original twenty-year readjustment intervals in force despite the terms of the FCLAA. Pet. App. A11.

* * * * *

Although petitioners appeal to the sanctity of contracts and "basic fairness," Pet. 16, they have no contractual right to oppose a ten-year readjustment interval. If the Secretary had proposed that change in 1988 and 1989, petitioners would have no legal ground for avoiding it. The Secretary's procedural misstep allowed petitioners to operate ten more years under the terms of their original leases. They are not entitled to 20 years.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1991

☆ U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/45025